Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1978

NO. 78-620

ROY ATKINSON, ADMINISTRATOR of the
Estate of Alex Norris Atkinson

Petitioner

V.

E. R. BASS AND A. J. HAYES, JR.

Respondents

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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The respondents, E. R. Bass and A. J. Hayes, Jr., respectfully request that this Court deny the petition for

writ of certiorari, seeking review of the Fourth Circuit's opinion in this case. That opinion is reported at 579 F.2d 865.

QUESTION PRESENTED

Whether it was error to grant summary judgment for respondents without a hearing and without notice to petitioner that there would be no hearing on the motion, when petitioner did not respond to the motion for summary judgment which, together with comprehensive and precise affidavits and memoranda, was served upon petitioner's attorney of record more than two months before summary judgment was rendered?

STATEMENT OF FACTS

The facts of the case are stated fully in the decisions of the District

Court (petitioner's appendix, page 51) and the Court of Appeals (petitioner's appendix, page 29). We wish to point out, however, that defendant respondents, Bass and Hayes, were, respectviely, police detective and police chief rather than deputy and sheriff as petitioner seems to believe (petitioner's STATEMENT OF THE CASE, p. 6). Also, no one "prevailed upon Judge Dupree...to grant the motion without a hearing and without informing plaintiff" (petitioner's STATEMENT OF THE CASE, p.8). The inquiry was initiated by Judge Dupree's law clerk or the District Court Clerk's Office (Widener's dissent - petition, p. 45).

REASONS WHY THE WRIT SHOULD BE DENIED

1. The petition for writ of certiorari filed by Roy Atkinson, Administrator of the Estate of Alex Norris Atkinson, petitioner, was not filed within the time required by Title 28 United States Code, Section 2101(c).

The judgment of the United States Court of Appeals, Fourth Circuit in favor of respondents was entered on July 13, 1978. No rehearing in behalf of petitioner was sought or denied. The petition for certiorari was filed on October 12, 1978, one day after the final day permitted by Title 28 United States Code, Section 2101 (c).

2. Petitioner was served with a copy of respondents' motion for summary

judgment and afforded, not ten days, but more than two months in which to respond. Yet during all that time he furnished not a single affidavit nor a shred of evidence to contradict the comprehensive, precise materials attached to respondents' motion for summary judgment. Neither did petitioner offer any explanation for his failure to respond nor even suggest to the Court that he was opposing the motion until after the order was entered. Petitioner might have requested a continuance under Rule 56(f) to obtain affidavits, take depositions or otherwise engage in discovery, but he ignored this remedy as well. As Judge Bryan stated in the majority opinion

(petitioner's appendix, page 34, 35):

> "...despite his insistance that he was prejudiced because denied a chance to present affidavits, he has not at any stage of this litigation disclosed what the affidavits would have averred. Furthermore, no proffer has ever been made of the testimony he expected from the witnesses, if they did not agree to give affidavits but had to be subpeonaed to testify at the trial. Consequently we are considering an unreal or speculative grievance."

Rule 78, Federal Rules of Civil Procedure, provides in part that:

> "To expedite its business, the Court may make provision by rule or order for submission and determination of motions without oral hearing upon brief written statements of reasons in support and opposition."

Responding to this authority the United States District Court for the Eastern District of North Carolina

adopted its local rule 4(H) as follows:

> "(H) Hearing on motion. Motions will be considered and decided without a hearing, unless otherwise ordered by the Court or unless requested by counsel for either movant or respondent. Uncontested motions will not be denied without giving the movant an opportunity to be heard." (Emphasis supplied.)

Petitioner did not request a hearing just as he did not respond to respondents' motion for summary judgment. Petitioner's right to a hearing is not preserved by respondents' request for a hearing. Respondents' willingness to waive their right to a hearing is consistent with the purpose of the local rule which provides that only the movant may consent to a hearing without argument on a seemingly "uncontested" motion. It is illogical to argue that the same confers some right to a hearing upon

petitioner, particularly in view of the facts of this case where even the dissenting opinion, upon which petitioner so heavily relies, states that petitioner could have avoided these results.

It is well established that due process does not always require the holding of an oral argument. FCC v. WJR, Goodwill Station, 337 U.S. 265, 275-276, 69 S.Ct. 1097, 93 L.Ed. 1353 (1949). Petitioner contends that the portion of the language of Local Rule 4 (H) which provides "...unless requested by counsel for either movant or respondent" entitles him to rely on movants' request. The case law of the Fourth Circuit is precisely to the contrary and the United States Supreme Court has previously

refused to review a similar decision. See United States Fidelity and Guaranty v. Lawrenson, 334 F.2d 464 (4th Cir. 1964) cert. den. 379 US 869.

The practice of dispensing with oral arguments on motions except in complicated cases is recommended by eminent authorities. See Proceedings of the Seminar on Procedures for Effective Judicial Administration, 29 FRD 191,301. To subject the decision of the district court to review of this Court in determining the wisdom of conducting a hearing would frustrate the very purpose of both Rule 78 of the Rules of Civil Procedure and Rule 4(H) of the Local Rules.

On page 14 of the petition, the case of Utility Control Corporation v.

Prince William Construction Co., Inc., 558 F.2d 716 (4th Cir. 1977) is cited as holding "...directly opposite to the holding in the instant case" The two cases are clearly distinguishable. In Utility Control Corporation v. Prince William Construction Co., Inc., supra, a motion for summary judgment was made after the trial had commenced and was granted on the very same day.

Likewise, all of the Fifth Circuit cases cited on page 15 of the petition are distinguishable since in each case a Rule 12(b)(6) motion to dismiss was treated as a motion for summary judgment and decided by the Court without affording the opposing party at least 10 days in which to respond. Mustang Fuel Corporation v.

Youngstown Sheet Tube Co., 480 F.2d 607 (10th Cir. 1973) cited on page 16 of the petition, is also not relevant to the case under consideration. There the motion for summary judgment was filed on one day and decided on the next in complete violation of the 10-day notice requirement of Rule 56 of the Rules of Civil Procedure.

Had petitioner been under some disability or a prisoner appearing pro se as was the case in Roseboro v. Garrison, 528 F.2d 309 (4th Cir. 1975) some special notice over and above the requirements of the Federal Rules of Civil Procedure might have been in order. However, such was not the case; petitioner in the present action is an

administrator seeking money damages and is represented by counsel of many years experience in the Federal Courts.

CONCLUSION

For these reasons the petition for certiorari should be denied.

Respectfully submitted,

BY _____
Louis B. Meyer

BY _____
R. Michael Jones

BY _____
William R. Rand

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Attorneys for Respondents

CERTIFICATE

In accordance with Rule 33 of the Supreme Court of the United States, I hereby certify that I have this 14th day of November, 1978, filed the required copies of the Respondents' Brief in Opposition in the Clerk's Office, and have mailed the required copies of the Respondents' Brief in Opposition to Herman L. Taylor, Post Office Box 20283, Greensboro, North Carolina, 27420.

_____
Louis B. Meyer

_____
R. Michael Jones

_____
William R. Rand